No. 86-1590

IN THE

SUPREME COURT OF THE UNITED STATES OF AMERICA

October Term, 1986

NOVINGER, KEVIN and NOVINGER, DARLENE,
Petitioners

v.

STEVEN M. KRAMER, ESQ.
CHARLES J. GEFFEN, ESQ.
LEE C. SWARTZ, ESQ.
Respondents in No. 86-5216
WILLIAM T. SMITH, ESQ.
Respondent in No. 86-5248

On Writ of Certiorari to the United States Court of Appeals
for the Third Circuit
(Appeal Nos. 86-5216 and 86-5248)

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Lee C. Swartz, Esquire
111 N. Front Street
P. O. Box 889
Harrisburg, PA 17108
717/234-4121
Respondent, pro se and
Counsel of Record

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

23pp

LIST OF ALL PARTIES

KEVIN NOVINGER and DARLENE NOVINGER,
Petitioners

v.

E. I. duPONT de NEMOURS & CO., INC.
MERCEDES-BENZ OF NORTH AMERICA, INC.
DAIMLER-BENZ ANTIEN GESELLSCHAFT GLASURITE
GmBH, BASF FARBER & FASERN AG and
GENERAL MOTORS CORP.

v.

LESONAL WERKE and DR. KURT HERBERTS CO. GmBH,
ORIGINAL IMPORTS, INC. and
RICHARD-YALE INDUSTRIES, INC.,
Defendants Below

STEVEN M. KRAMER, ESQ., CHARLES J. GEFFEN, ESQ.
LEE C. SWARTZ, ESQ. and WILLIAM T. SMITH, ESQ.
Respondents

TABLE OF CONTENTS

	Page
LIST OF ALL PARTIES	i
STATUTE INVOLVED	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	5
ARGUMENT	6
CONCLUSION	16

TABLE OF AUTHORITIES

Cases:	Page
Brotherhood of Locomotive Firemen v. Bangor and Arostrock Railroad Company, 389 U.S. 327, 328, 88 S.Ct. 437, 19 L.Ed.2d 560 (1967)	15
Colby v. Cities Service Oil Company, 254 F.2d 665 (10th Cir. 1958)	13
Dick v. New York Life Insurance Company, 359 U.S. 437, 79 S.Ct. 921, 3 L.Ed.2d 935 (1959)	12
Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976) (dissent of Justice Stevens)	15
Federal Trade Commission v. American Tobacco Company, 274 U.S. 543, 544, 47 S.Ct. 663, 71 L.Ed. 1193, 1194 (1927)	11
Furness, W. & Company v. Yang-Tsze Insurance Association, 242 U.S. 430, 31 S. Ct. 141, 61 L.Ed. 409 (1917)	9
General Talking Pictures Corporation v. Western Electric Company, 304 U.S. 175, 58 S.Ct. 849 82 L.Ed 1273 (1938), adhered to 305 U.S. 124, 59 S.Ct. 116, 83 L.Ed. 81, rehearing denied, 305 U.S. 675, 59 S.Ct. 355, 83 L.Ed. 437 (1939)	11
Gibson v. U.S., 329 U.S. 338, 67 S.Ct. 301, 91 L.Ed. 331 (1946)	14
Goodman v. U.S., 398 F.2d 879 (9th Cir. 1968)	13
Hamilton-Brown Shoe Company v. Wolf Brothers & Co., 240 U.S. 251, 258, 36 S.Ct. 269, 60 L.Ed. 629 (1916)	15
Hamling v. U.S., 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed. 2d 590, rehearing denied 419 U.S. 885, 95 S.Ct. 157, 42 L.Ed.2d 129 (1974)	13
Heckler v. Edwards, 465 U.S. 870, 104 S.Ct. 1532, 79 L.Ed. 2d 878 (1984)	10

TABLE OF AUTHORITIES—*(Continued)*

Cases:	Page
Hurwitz v. Hurwitz, 136 F.2d 796 (D.C. Cir. 1943)	13
Joe Gibson v. Phillips Petroleum Company, 352 U.S. 874, 77 S.Ct. 16, 1 L.Ed. 2d 77 (1956)	11
Layne & Bowler Corporation v. Western Well Works, 261 U.S. 387, 393, 43 S.Ct. 422, 67 L.Ed. 712, 714 (1923)	9
McGraw-Edison Company v. Central Transformer Corporation, 308 F.2d 70 (8th Cir. 1962)	13
Murphy v. Turner, 426 F.2d 422 (10th Cir. 1970)	14
N.L.R.B. v. Hendricks City Rural Electric Corporation, 454 U.S. 170, 176, 102 S.Ct. 216, 70 L.Ed.2d 323, 330, Footnote 8 (1981)	10
N.L.R.B. v. Pittsburgh S.S. Company, 340 U.S. 498, 71 S.Ct. 453, 95 L.Ed. 479 (1951)	11
Pacific Cage and Screen Company v. Continental Cage Company, 259 F.2d 87 (9th Cir. 1958)	14
Permalife Mufflers v. International Parts Corporation, 392 U.S. 134, 136, 88 S.Ct. 1981, 20 L.Ed.2d 982 (1968)	12
Rice v. Sioux City Cemetery, 349 U.S. 70, 74, 75 S.Ct. 614, 99 L.Ed. 897, 901 (1955)	9
Ross v. Moffitt, 417 U.S. 600, 616, 44 S.Ct. 2437, 41 L.Ed.2d 343 (1974, J. Rehnquist)	12
Seminole Nation v. U.S., 316 U.S. 286, 62 S.Ct. 1049, 86 L.Ed. 1480 (1942)	14
Sierra Club v. March, 769 F.2d 868 (1st Cir. 1985)	14
Southern Power Company v. N.C. Public Service, 263 U.S. 508, 44 S.Ct. 164, 68 L.Ed. 413 (1924)	8, 10

TABLE OF AUTHORITIES—*(Continued)*

Cases: Page

U.S. v. James J. Johnson, 268 U.S. 220, 45 S.Ct. 496, 69 L.Ed. 925 (1925) 11

U.S. v. Ratke, 316 F.2d 225 (6th Cir. 1963) 13

U.S. v. Rusmisel, 716 F.2d 301 (5th Cir. 1983) 14

Wilks County v. W.N. Cooler and Company, 186 U.S. 481 No. 558, 23 S.Ct. 738, 46 L.Ed. 1260 (1902) 8

Williams v. Lee, 358 U.S. 217, 218 79 S.Ct. 269, 3 L.Ed.2d 251 (1959) 12

Yellow Poplar Lumber Company v. Chapman, 215 U.S. 601, 30 S.Ct. 451, 54 L.Ed. 344 (1909) 8

Statutes:

28 U.S.C. Sec. 1252 10

28 U.S.C. Sec. 1291 1

28 U.S.C. Sec. 2106 13

39 U.S.C.A. Sec. 1001 ..... 2, 15

39 U.S.C.A. Sec. 1001(b) 2, 15

Rules:

U.S. Supreme Court Rule 17.1 ..... 5, 6, 7, 8, 10

U.S. Supreme Court Rule 21.1(j) 5, 6

Law Review Articles:

Prettyman, Petitioning for the United States Supreme Court — A Primer for the Hopeful Neophyte, 51 Va. L. Rev. 582 (1965) 7

Texts and Treatises:

2 Fed. Proc. App., Cert. and Review §3:197 (1981) 7

2 Fed. Proc., L.Ed. §3:644 (1981) 13

2 Federal Practice, L.Ed. §3:696 (1981) 13

TABLE OF AUTHORITIES—*(Continued)*

Texts and Treaties: Page

Robert L. Stern, Eugene Gressman and Steven M. Shapiro, Supreme Court Practice, page 224, §4.18 (6th Ed. 1986) 15

No. 86-1590

IN THE

SUPREME COURT OF THE UNITED STATES OF AMERICA

October Term, 1986

NOVINGER, KEVIN and NOVINGER, DARLENE,
Petitioners

v.

STEVEN M. KRAMER, ESQ.
CHARLES J. GEFFEN, ESQ.
LEE C. SWARTZ, ESQ.
Respondents in No. 86-5216
WILLIAM T. SMITH, ESQ.
Respondent in No. 86-5248

On Writ of Certiorari to the United States Court of Appeals
for the Third Circuit
(Appeal Nos. 86-5216 and 86-5248)

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

STATUTES INVOLVED

28 U.S.C. Sec. 1291

Respondent objects to and finds irrelevant the statutes set forth by Petitioners in their petition.

Statutes 39 U.S.C.A. Sec. 1001 and 39 U.S.C.A. Sec. 1001(b) are not elaborated on nor explained in Petitioners' petition and deal with subjects not at issue in this petition.

STATEMENT OF THE CASE

The Petitioners and Plaintiffs below initiated a diversity products liability action which, although never tried, culminated in the expenditure of at least 10 sets of attorneys over a period of almost eight years. The Respondent here, Lee C. Swartz, as well as the Respondents who represented the Petitioners over this period of time, experienced problems representing the Novingers which resulted in their dismissal or voluntary withdrawal from the unpleasant and distrustful Petitioners.

The Respondent, Lee C. Swartz, became involved with the representation of the Petitioners by way of William T. Smith, counsel of the Petitioners at that time. On December 17, 1980, the Petitioners, Kevin Novinger and Darlene Novinger, entered into a contingent fee agreement with William T. Smith, to prosecute two civil actions as a result of their alleged personal injuries incurred as a result of exposure to certain toxic substances.

The contingent fee agreement provided for 25% received by way of settlement and 33-1/3% received after trial and verdict. On February 10, 1981, the said William T. Smith contacted Lee C. Swartz and requested that the latter participate in the two cases on behalf of the clients with any fees to be divided equally between the firms of Hepford, Swartz, Menaker & Morgan (then "Hepford, Swartz, Menaker & Wilt") and Smith and Smith, P.C.

It was agreed between Lee C. Swartz and William T. Smith that the respective firms would advance costs on behalf of the Petitioners, who were said to be indigent, and share equally in this expense.

On February 23, 1981, in the presence of William T. Smith and his associate, David E. Cole, Lee C. Swartz met with the Petitioners, Kevin and Darlene Novinger, at which time the Novingers requested that Mr. Swartz associate with Mr. Smith in pursuit of their case, and that counsel fees not be duplicated. It was further explained to the Novingers that Mr. Swartz was a

specialist in civil litigation, particularly products liability actions, and that he would take over the management strategy and become, in effect, lead counsel in the case. The Novingers fully agreed and requested that Mr. Swartz represent them under these circumstances. The team of Smith and Swartz, and their law firms, respectively, expended efforts over a period of almost two years to develop the Novinger's case, to explain to them its strengths and weaknesses and to obtain their cooperation and assistance in order to achieve the goal of just compensation for the injuries sustained. The preparation of the Novingers' case was very complex, and each service rendered was documented by detailed time records describing the service rendered and by whom they were rendered. The attorneys met with the Novingers personally on numerous occasions, consulting with them, planning the strategy in their case, preparing them for depositions and advising them with respect to medical consultants. Attorney Swartz and the firm of Hepford, Swartz, Menaker & Morgan expended the sum of $4,902.25 in costs on behalf of the Novingers, including advancements for the payment of various expert expenses, purchase of paint samples (at the Novingers' request), investigation expenses, travel expenses, including a trip to Florida and a trip to Long Island, New York, telephone calls and photocopies. The total time expended by the firm of Hepford, Swartz, Menaker & Morgan includes 211.3 hours of time by counsel and an additional 387.9 of paralegal and law clerk time.

During the course of Swartz' experience with the Novingers, a great deal of time was taken dealing with the extradordinary problems which the Novingers' distrust generated. The Novingers displayed a continuous disrespect and distrust for the court which made it extremely difficult for the attorneys to obtain their cooperation in submitting to depositions and complying with other court orders. In addition, the Novingers refused to cooperate in the discovery process, resulting in the defendants' lack of cooperation in discovery. The continual reluctance to provide information and the growing suspicion and distrust of the representation by the Novingers greatly impeded Respondent

from preparing the case for trial. Eventually, the Novingers became so dissatisfied that they sought advice from various attorneys, without communicating directly to Mr. Swartz any desire that he withdraw as counsel or cease their representation.

The Novingers then retained Bruce D. Desfor to represent them. Mr. Desfor indicated his desire to retain Mr. Swartz in the case because of his expertise in the area, and his knowledge and development of the case and the theories of liability and damages. By the retaining of Mr. Desfor, Mr. Swartz believed and understood that the Novingers agreed that Mr. Desfor would be responsible for the supervision and managment of the case to the relief of Mr. Swartz. On November 17, 1982, the Novingers signed an agreement of release releasing Lee C. Swartz, as well as William T. Smith and David E. Cole, as counsel in the case. The release was not a mutual release and did not mention compensation for reimbursements for costs advanced. Pursuant to an oral agreement between Mr. Desfor and Respondent Swartz, Swartz was to retain the responsibility of lining up experts, including medical, obtaining opinions and attempting to develop the damages aspect of the case through the experts, as well as assisting in the preparation of experts in the event of trial, and appearing at trial to work with the experts.

Finally, Mr. Desfor withdrew as counsel, and Mr. Swartz, with the permission of the court, also withdrew and after more than a year of numerous contacts with lawyers from Central Pennsylvania and elsewhere, the Novingers selected Allan Kanner to represent them.

In January 1986, relying primarily on their support of experts developed by prior counsel, including Respondent Swartz, Petitioners settled the case for an undisclosed amount which has been sealed by the court. Respondent Swartz, and Hepford, Swartz, Menaker & Morgan submitted their statement of fees and costs pursuant to the direction of Judge Rambo, U.S. District Court for the Middle District of Pennsylvania on May 11, 1984. Respondent Swartz and Mr. Smith each filed a motion for counsel fees and expenses with Judge Rambo, which was briefed and opposed by Mr. Kanner. Mr. Kanner filed a motion to file a motion and memorandum out of time (having failed to comply

with the rules of the United States District Court for the Middle District of Pennsylvania), which memorandum was replete with erroneous factual allegations unsupported by affidavits or testimony. The motion of Respondent Swartz for counsel fees and expenses was dismissed by Judge Rambo without a hearing on the basis that Swartz had released his claim. Swartz appealed the order of Judge Rambo, requesting compensation for legal services and costs advanced based on the lack of opportunity to provide testimony concerning their efforts and progress in the litigation, as well as Petitioners' own actions which impeded Swartz' ability to dispose of the case or establish that his claim was not released.

The United States Court of Appeals for the Third Circuit reversed the order of the United States District Court for the Middle District of Pennsylvania and remanded for further proceedings in order that Respondent Swartz, and other counsel for the Novingers, could present their case knowledgeably. The Court of Appeals for the Third Circuit found the decision of the District Court unsupported by the record, and found that the record, without further argument or testimony, was indispositive of the question of whether Respondent intentionally released the right to payment for the reasonable value of their services rendered.

Petitoners now petition this Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Third Circuit.

SUMMARY OF ARGUMENT

Petitioners' petition for certiorari should be denied due to their failure to set forth any reasons why this Court should grant the petition. Petitioners are required to set forth the reasons for a grant of certiorari by Supreme Court Rule 21.1(j). Despite Petitioners' blatant failure to set forth any reasons for granting the writ, the petition should nevertheless be denied because Petitioners' case is not the type of case considered worthy of certiorari pursuant to Supreme Court Rule 17. There are no other

express or implied substantial, special or important reasons why this Court should grant the petition.

A review of Petitioners' case would benefit only the particular litigants of this case. Petitioners express a mere dissatisfaction with the disposition of the case by the United States Court of Appeals for the Third Circuit. This Court is not the appropriate forum for reviewing errors in decisions or in reviewing strictly evidentiary matters. The court of appeals has the discretion and the ability to review and dispose of the decision in the manner in which they chose. Due to the inability of the evidence on the record to substantiate the district court's decision, the Court of Appeals for the Third Circuit reversed the district court's decision and remanded for further proceedings.

Petitioners' petition is also inappropriate for review due to its interlocutory nature, in that the Court of Appeals for the Third Circuit remanded the case for further proceedings, as a result the case is not yet ripe for review by this Court.

Due to the lack of precision, care and clarity in the preparation of Petitioners' petition for certiorari, Petitioners have omitted the statement or the showing of any substantial or important reasons why this Court should grant review. Petitioners' petition for certiorari should be denied and the case allowed to proceed as ordered by the United States Court of Appeals for the Third Circuit.

ARGUMENT

Petitioners, in their presentation for certiorari, offer no reasons why this Court should consider granting certiorari. Supreme Court Rule 21.1(j) requires that a direct and concise argument amplifying the reasons relied on for the allowance of the writ be specified in the petition for certiorari.

Supreme Court Rule 21.1(j), which requires the petitioner to set forth the reasons relied on the for the allowance of the writ, directs the petitioner to Supreme Court Rule 17, which provides considerations governing review on certiorari. Supreme Court Rule 17 provides, in part, that review on writ of certiorari is not a matter of right, but of judicial discretion; and, writ is granted

only on the presentation of special and important reasons therefor. Rule 17 indicates the character of reasons considered:

> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided the federal question in a way in conflict with the state court of last resort; or has so departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure from a lower court, as to call for an exercise of this court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way in conflict with a decision of another state court of last resort or of a federal court of appeals.
>
> (c) When a state court or a federal court of appeals has decided on an important question of federal law which has not been, but should be, settled by this court, or has decided a federal question in a way in conflict with applicable decisions of this court.

Supreme Court Rule 17.1

Petitioners' petition is lacking and unworthy of consideration on certiorari not only because of the complete failure to set forth any reasons why this Court should consider granting certiorari, but also because the substance of Petitioners' issues presented are not of the caliber meritorious of review or consideration by this high court. Petitioners failed to set forth any reasons for allowing the writ, and instead improperly argued the merits of their case. The reasons enumerated for granting the writ should not be a brief on the merits, but should show why a proper development of the law requires that the Court answer the questions proposed by the case. 2 Fed. Proc. App., Cert. and Review §3:197 (1981), Prettyman, Petitioning for the United States Supreme Court — A Primer for the Hopeful Neophyte, 51 Va. L. Rev. 582 (1965). Petitioners not only argue the merits of their case, but frequently and improperly misconstrue the actions, arguments and decisions below in language which borders on libel. Petitioners' petition should be stricken, if for no other

reason, for its content of impertinent, scandalous and unwarranted matter presented in an exaggerated and unprofessional fashion. *Wilks County v. W.N. Cooler and Company*, 186 U.S. 481 No. 558, 23 S.Ct. 738, 46 L. Ed. 1260 (1902); *Yellow Poplar Lumber Company v. Chapman*, 215 U.S. 601, 30 S.Ct. 451, 54 L.Ed. 344 (1909).

Petitioners seek review of the decision of the U.S. Court of Appeals for the Third Circuit. However, Petitioners offer no persuasion to this Court as to why such a review is necessary and what such a review would accomplish regarding the development of the law in the area, the resolution of any controversy, or the benefits a review would hold for the public. Petitioners fail to come within any consideration under Supreme Court Rule 17 or other appropriate consideration. The petition expresses only a dissatisfaction with the disposition of the issues resolved by the Court of Appeals for the Third Circuit, as a reason for review by writ of certiorari.

It is elementary that the only way this Court can become educated on the need to review an issue or case or to determine whether a particular case contains the requisite substantial and important reasons, is through a clear and concise petition. It is imperative then that a petition set out clear, definite and complete disclosures concerning the controversy at hand. *Southern Power Company v. N.C. Public Service*, 263 U.S. 508, 44 S.Ct. 164, 68 L. Ed. 413 (1924).

The Petitioners clutter their petition with arguments on the merits instead of with persuasive reasons. Such arguments are an exercise in futility if the Court is in no way enlightened as to whether it is a proper matter to add to their docket. In the interest of judicial economy and fairness to all litigants, only cases worthy of additional review should be granted certiorari. The Court would be decidely overburdened if every petitioner were derelict in his responsibility to effectively set forth his contentions of merit. Unless a petition is carefully prepared, contains appropriate references to the record, and presents in an accurate, brief and clear manner, that which is essential to an adequate and ready understanding of points requiring the Court's

attention, interested parties are prejudiced and the Court is impeded in the disposal of meritorious causes. *Furness, W. & Compamy v. Yang-Tsze Insurance Association*, 242 U.S. 430, 31 S.Ct. 141, 61 L. Ed. 409 (1917).

Petitioners cite no need for this case to be resolved for the benefit of this area of law. Petitioners cite no conflict with any state court decision or decision in the Circuit Court on this particular issue. Petitioners cite no departure from judicial proceedings that would warrant this Court's supervision. Lastly, Petitioners cite no problems of public importance to justify review, and it is improper for a solely private dispute to be reviewed in this Court on that basis alone. This Court has consistently maintained the practice of granting certiorari only in cases involving principles, the settlement of which is of importance to the public as distinguished from that of private parties. *Layne & Bowler Corporation v. Western Well Works*, 261 U.S. 387, 393, 43 S.Ct. 422, 67 L.Ed. 712, 714 (1923). Nothing in the petition heightens the Petitioners' request for review beyond anything other than a private dispute. Petitioners' petition should be denied, without further consideration, due to the failure to express any reasons why the writ should be granted.

If this Court were to look beyond the failure to expressly set forth the reasons for certiorari, no other substantial, specific or important reasons exist or can be implied for a grant of certiorari. A grant of certiorari based on grounds of substantial or important reasons is a subjective determination, but not complex. A petition should first raise and identify what the alleged substantial and important reasons are upon which the request for review is based. Secondly, the reasons raised should be concrete and real which illuminate a genuine controversy. Abstract questions presenting intellectually interesting and scholarly problems and problems tailored to particular litigants are not entertained by this Court. Specific and important reasons reach to problems beyond the academic and the episodic. *Rice v. Sioux City Cemetery*, 349 U.S. 70,74,75 S.Ct. 614,99 L.Ed. 897, 901 (1955). Petitioners in the case at bar expect this Court not only to glean

whatever implied reasons they possess for the review out of the petition itself, but also expect the Court to unnecessarily review a decision based on only their individual dissatisfaction.

This Court has before commented on its dislike for passing judgment on issues of little or minor importance, such as the awarding of attorney's fees. In discussing mandatory review and the direct appeal provisions of 28 U.S.C.S. §1252, this Court in *Heckler v. Edwards*,465 U.S. 870, 104 S.Ct. 1532, 79 L.Ed. 2d 878 (1984), stated:

> If we were to adopt respondent's construction of the language, this court would be required to give precedence to issues outside the congressional definition of public importance. We would, for example, be obliged to crowd our docket with appeals concerned solely with attorney's fees awards or pendent claims arising under state law—matters that would typically fail to meet our criteria for discretionary review. See Supreme Court Rule 17. Appeals of this sort would almost certainly be better handled by the court of appeals, which is where they will lie under their interpretation of §1252 that we adopt today.

Heckler, 465 U.S. at 876.

Even if a petition recites a grave question of vital public importance, which Petitioners' certainly does not, if the petition reflects no more than a primarily factual argument, such as the case at bar, no grounds exist for granting certiorari. *Southern Power Company v. N.C. Public Service*,263 U.S. 508, 44 S.Ct. 164, 68 L.Ed. 413 (1924); *N.L.R.B. v. Hendricks City Rural Electric Corporation*, 454 U.S. 170, 176, 102 S.Ct. 216, 70 L.Ed. 2d 323, 330, Footnote 8 (1981).

Addressing Petitioner's assertion of arguments on the merits of the case, the petition presented to the Court discusses at length and argues the factual findings and the sufficiency of such findings in the decisions below. Respondent submits that the proposed arguments and requested review are improper and should be denied as improperly raised. This Court is not a place to review a conflict of evidence nor to reverse a court of appeals because of an inclination that, were this Court in its place, it

would have found the record tilting one way rather than the other, where fairminded judges could find it tilting either way. *N.L.R.B. v. Pittsburgh S.S. Company*, 340, U.S. 498, 71 S.Ct. 453, 95 L.Ed. 479 (1951) (on writ of certiorari from Court of Appeals for the Sixth Circuit, from order of Labor Board):

> It is not for us to invite review by this court of decisions turning solely on evaluation of testimony where on a conscious consideration of the entire record a court of appeals. . . finds the Board's order unsubstantiated. In such situations we should "adhere to the usual rule of non-interference where conclusions of circuit courts of appeals depend on the appreciation of circumstances which admit of different interpretations." *Federal Trade Commission v. American Tobacco Company*, 274 U.S. 543, 544, 47 S.Ct. 663, 71 L.Ed. 1193, 1194 (1927).

N.L.R.B. 340 U.S. at 503.

In his dissent in *Joe Gibson v. Phillips Petroleum Company*, 352 U.S. 874, 77 S.Ct. 16, 1 L.Ed. 2d 77 (1956), Justice Frankfurter (with Justice Harlan joining) stated that the Court has respected the purpose of the enactment establishing courts of appeals (1891). The court has repeatedly stated that it does not sit to correct errors, even plain errors, in a case, particularly of local controversy. "The Supreme Court of the U.S. is designed for important questions of general significance in the construction of federal law and in the adjustment of the serious controversies that arise in the federal system . . ." 352 U.S. at 875.

Petitioner's improperly review the evidentiary findings and interpretations of the decisions below. However, the Supreme Court will not grant and should not grant writ of certiorari merely to review evidence or inferences drawn from it, or to discuss specific facts. *General Talking Pictures Corporation v. Western Electric Company*, 304 U.S. 175, 58 S.Ct. 849 82 L.Ed. 1273 (1938), adhered to 305 U.S. 124, 59 S.Ct. 116, 83 L.Ed. 81, rehearing denied, 305 U.S. 675, 59 S.Ct. 355, 83 L.Ed. 437 (1939). See also *U.S. v. James J. Johnson*, 268 U.S. 220, 45 S.Ct. 496, 69 L.Ed. 925 (1925).

Just as Petitioners allege in their petition that the district court is better able to determine the facts, so too is the court of appeals better able to examine records for sufficiency of evidence. An independent review of the court of appeals review is not the function of this Court. Whether this Court agrees or disagrees with the court of appeals' evaluation of the evidence, a tolerant judgment can truly not conclude that it does not represent a fair, judicial determination. "After all, we are reviewing the judgment of the court of appeals, and it is its judgment that must be subjected to the rule of reason." *Dick v. New York Life Insurance Company*, 359 U.S. 437, 79 S.Ct. 921, 3 L.Ed. 2d 935 (1959) (dissenting opinion, Frankfurter joined by Whittaker).

This Court does not, and has not reviewed or granted certiorari to consider merely the correctness of a decision. "This court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review." *Ross v. Moffitt*, 417 U.S. 600, 616, 44 S.Ct. 2437, 41 L.Ed. 2d 343 (1974, J. Rehnquist). Standing alone, this Court should not grant certiorari on the basis of correctness, and as is obvious from the petition, Petitioners do not couple this basis with any other factor of substance or importance, e.g. *Williams v. Lee*, 358 U.S. 217, 218, 79 S.Ct. 269, 3 L.Ed. 2d 251 (1959) (important question of state power over Indian affairs), *Permalife Mufflers v. International Parts Corporation*,392 U.S. 134, 136, 88 S.Ct. 1981, 20 L.Ed. 2d 982 (1968) (decision of court of appeals affected enforcement of antitrust policy in U.S.). The petition of certiorari should be denied due to the failure of any implied substantial or important factors or reasons, beyond the complaint of an alleged erroneous decision.

In an effort to raise all objections to Petitioners' petition for certiorari, Respondent briefly addresses the merits of the case regarding Respondent Lee C. Swartz. The Court of Appeals for the Third Circuit did not overstep its scope of review in determining that, absent a hearing, the district court's reasoning was inadequate to support the dismissal, that the record and findings did not support the conclusion, or in remanding for further proceedings on an unresolved question of fact.

A court of appeals is given broad authority to review judgments and orders. 2 Federal Procedure Lawyer's Ed. §3:644 (1981), *McGraw-Edison Company v. Central Transformer Corporation*, 308 F.2d 70 (8th Cir. 1962). Given such authority, it is the court of appeals that is primarily responsible for reviewing the sufficiency of the evidence below. *Hamling v. U.S.*, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed. 2d 590, rehearing denied 419 U.S. 885, 95 S.Ct. 157, 42 L.Ed. 2d 129, (1974). In the instant case, the Third Circuit found that absent a hearing to determine the remaining factual questions of the intent of the parties and the extent of the waiver agreed upon, the record is insufficient to support the district court's conclusion. The Court of Appeals held that the record does not permit the conclusion that Respondent Lee C. Swartz made no contribution to the Petitioners' fund of settlement proceeds. In addition, the Court of Appeals found the district court's decision devoid of the reasons eluded to which find the record sufficient. Thus, the district court's decision was not clearly supported by the record, which was itself insufficient to support the judgment, and clearly within the Court of Appeals' power to reverse. *Hurwitz v. Hurwitz*, 136 F.2d 796 (D.C. Cir. 1943), *Goodman v. U.S.*, 398 F.2d 879 (9th Cir. 1968). Section 2106 of the Title 28 U.S.C., Judiciary and Judicial Procedure, provides that a court of appellate jurisdiction may, among other things, reverse and remand a cause, or require further proceedings that may be just under the circumstances. Certainly, the decision and order of the Third Circuit Court of Appeals was within the purview of that statute.

Also, an appellate court can properly reverse if the evidence is insufficient to support the judgment below and an injustice has been done. *U.S. v. Ratke*, 316 F.2d 225 (6th Cir. 1963), *Colby v. Cities Service Oil Company*, 254 F.2d 665 (10th Cir. 1958), 2 Federal Practice, L.Ed. §3:696 (1981). If the Respondent is unable to adequately present his supporting evidence in this case, an injustice will be done. The Court of Appeals for the Third Circuit properly determined, without reviewing the evidence de novo, that the judgment rendered by the district court did not have a rational basis in the facts reviewed by that Court. Indeed, the Court of Appeals for the Third Circuit followed the

only proper course, because it could not determine a case where relevant evidence was wrongfully excluded by the trial court. A remand, and in this case a hearing on the excluded additional evidence is necessary and proper. *Gibson v. U.S.*, 329 U.S. 338, 67 S.Ct. 301, 91 L.Ed. 331 (1946), *Seminole Nation v. U.S.*, 316 U.S. 286, 62 S.Ct. 1049, 86 L.Ed. 1480 (1942). An appellate court can properly request a record be supplemented or refuse to hear an appeal before the record is amplified. *Pacific Cage and Screen Company v. Continental Cage Company*, 259 F.2d 87 (9th Cir. 1958).

A recent decision in the First Circuit, *Sierra Club v. March*, 769 F.2d 868 (1st Cir. 1985) stated that where a district court simply reviews documents, and does not consider witnesses' testimony, the appellate court has greater freedom to differ with the district court's determination. The ability of the appellate court to rightly differ depends primarily on whether the district court applied and evaluated the documents with the same standard as the appellate court. The appellate court should not so readily defer to the district court's decision when the advantage of evaluating live witness testimony and/or attorney explanations are absent. In the case at bar, the District Court rendered its decision upon evaluation of written briefs of the parties. The District Court's decision should not be deferred to here because it did not utilize any evidence that the Court of Appeals could not evaluate under the same legal standards or from the same perception.

The Court for the Third Circuit properly found that as a matter of law, it could not be concluded that Respondent Lee C. Swartz made no contribution to and had no entitlement to Petitioners' fund. An appellate court may exercise independent judgment and enter its own conclusions of law. *Murphy v. Turner*, 426 F.2d 422 (10th Cir. 1970). *U.S. v. Rusmisel*, 716 F.2d 301 (5th Cir. 1983).

In another matter, the Petitioners seek review on an issue not yet ripe for review. The court of appeals reversed and remanded this case for further findings. This Court should deny this request for an interlocutory review. The lack of finality in the judgment below may "of itself alone" furnish "sufficient grounds

for the denial of the application." Robert L. Stern, Eugene Gressman and Steven M. Shapiro, Supreme Court Practice, page 224, §4.18 (6th Ed. 1986). *Hamilton-Brown Shoe Company v. Wolf Brothers & Co.*, 240 U.S. 251, 258 36 S.Ct. 269, 60 L.Ed. 629 (1916), *Brotherhood of Locomotive Firemen v. Bangor and Arostock Railroad Company*, 389 U.S. 327, 328, 88 S.Ct. 437, 19 L.Ed. 2d 560 (1967), *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed. 2d 251 (1976) (dissent of Justice Stevens).

Finally, Respondent objects and finds totally in error and irrelevant Petitioners' statutory reference, in their petition, to Title 39 U.S.C.A. §§1001 and 1001(b) (pertaining to the appointment and status of employment within the Postal Service). Respondent fails to see, and Petitioners fail to explain, what express or implied relation that statute bears to this case. Respondent can only conclude that the citation is an error, further evidencing the lack and care and precision utilized by the Petitioners in preparing their petition for writ and enumerating those elements necessary for the Court's determination of granting or denying certiorari.

CONCLUSION

Petitioners' petition should be denied for failure to set forth or express any reasons why this Court should grant certiorari. No implied or other reasons exist which would warrant a grant of certiorari.

The ruling of the Court of Appeals for the Third Circuit which reverses the District Court's decision and remands for further proceedings to resolve a question of fact, does not present an important question of federal law unsettled by this court, or one in conflict with decisions of this Court, or a question of such public importance that it would merit review by this Court. Petitioners blatantly and expressly fail to enumerate any reasons why this Court should grant certiorari. In addition, the ability and discretion of the appeals court to render the decision it did, the interlocutory status of the case and the deficient preparation of the petition direct a denial of the petition for writ of certiorari. Based on the above stated reasons, this Court should deny Petitioners' writ of certiorari, that the case may properly and adequately be disposed per the order of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

Lee C. Swartz. Respondent, pro se
and Counsel of Record
111 N. Front St., P.O. Box 889
Harrisburg, PA 17108
717/234-4121